STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 16, 2003
v	No. 242383 Wayne Circuit Court
TRAVIS TRAMMELL, Defendant-Appellant.	LC No. 01-008275

Before: Saad, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals by right his convictions and sentences, after a jury trial, for second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and felony firearm, MCL 750.227b. Defendant was originally charged with first-degree premeditated murder, and the prosecutor also included in the charging documents a notice that defendant was subject to an enhanced sentence under MCL 769.10. Defendant argues that the sentence guidelines were incorrectly scored, and that he was denied the effective assistance of counsel when counsel failed to preserve part of the alleged guidelines scoring errors for appeal. Defendant also claims he was denied a fair trial by the admission of certain hearsay and by the trial court limiting his cross-examination. We find none of the alleged errors merit reversal or resentencing. Accordingly, we affirm defendant's convictions and sentences.

First, defendant argues that PRV-3 was inaccurately scored at 50 points for "3 or more prior high severity juvenile adjudications." MCL 777.53(1)(a). The presentence report (PSIR) listed three high severity juvenile adjudications: (1) a 9/30/86 robbery armed; (2) a 10/16/86 breaking and entering an occupied dwelling; and (3) a 10/18/86 larceny from a person. Based on a juvenile court "print-out," defendant claims that the September 1986 armed robbery charge and an October 1986 assault and battery charge were dismissed pursuant to plea bargaining and should not have been used to score the guidelines. According to defendant, PRV-3 should have been scored at 25 points for two high severity juvenile adjudications. Defendant preserved his argument regarding the armed robbery adjudication by objecting at sentence. MCR 6.429(C); *People v McGuffey*, 251 Mich App 155, 165-166; 649 NW2d 801 (2002).

We review the factual findings of the trial court at sentencing for clear error. MCR 2.613(C); *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). But the proper construction or application of statutory sentencing guidelines presents a question of law reviewed de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). A trial court has discretion in scoring the sentence guidelines, *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), and this Court will uphold the trial court's guidelines scoring where there is any evidence in the record to support it, *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). Accordingly, this Court "reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; ___ NW2d ___. We conclude that defendant failed to raise an effective challenge, either in the trial court or in this Court, to the information in the PSIR on which the scoring of PRV-3 was based.

At sentencing, a trial court is entitled to rely on information contained in the PSIR. *People v Grant*, 455 Mich 221, 233; 565 NW2d 389 (1997). Although the trial court has a duty to respond to challenges to the accuracy of facts contained in the PSIR, *People v McAllister*, 241 Mich App 466, 473; 616 NW2d 203 (2000), a defendant bears the initial burden of presenting a prima facie case of constitutional infirmity when raising a collateral challenge to a prior conviction, *People v Carpentier*, 446 Mich 19, 23-24, 31-35; 521 NW2d 195 (1994). See also, *People v Alexander*, 234 Mich App 665, 670- 671; 599 NW2d 749 (1999), and *People v Zinn*, 217 Mich App 340, 343; 551 NW2d 704 (1996). In *Carpentier*, *supra*, the defendant's juvenile records had been destroyed, but our Supreme Court explained that "collateral challenges implicate extraordinary remedies and, accordingly, . . . the initial burden of proof must in fact rest with a defendant." *Id*. at 32. The Court further reasoned "that while presuming invalidity from a silent or unavailable record may be appropriate on direct review, such a presumption is less compelling in a collateral challenge where the countervailing presumption of regularity is entitled to greater deference." *Id*. at 37. Only when a defendant meets his prima facie burden is a hearing required, *Alexander*, *supra*, and the burden shifts to the prosecutor to establish its constitutional validity, *Zinn*, *supra*. An averment by the defendant is insufficient to raise a prima facie collateral challenge to a prior juvenile adjudication. *People v Love (After Remand)*, 214 Mich App 296, 300-301; 542 NW2d 374 (1995). We believe no less a standard applies to defendant's claim in this case. See, e.g., *Love, supra* at 300 (a claim the conviction did not exist), and MCL 769.13(6) (for purposes of the Habitual Offender Act, the "defendant shall bear the burden of establishing a prima facie showing that an alleged prior conviction is inaccurate or constitutionally invalid").

In *People v Walker*, 428 Mich 261, 268; 407 NW2d 367(1987), our Supreme Court adopted as a matter of policy that when a defendant "effectively challenges" a material fact pertinent to a guidelines score, the prosecutor has the burden to prove that fact by the preponderance of the evidence. But when record evidence both supports and opposes a particular guidelines score, the trial court has discretion whether to entertain further proofs. *Walker*, *supra*; *People v Ewing (After Remand)*, 435 Mich 443, 474-475 (Boyle, J.); 458 NW2d 880 (1990). Here, the PSIR noted defendant's juvenile history included an adjudication on December 11, 1986 for "Robbery Armed" at which defendant was represented by counsel and which resulted in defendant's commitment to the Department of Social Services. At sentencing, defense counsel noted that defendant "disputes an armed robbery as a juvenile." The record does not reflect that

counsel presented the trial court with any documentary evidence to support defendant's claim. So, defendant's assertion through counsel was insufficient to effectively challenge the information in the PSIR. *Walker*, *supra* at 268; *Love, supra.* Rather, the trial court could rely on the PSIR. *Grant, supra* at 233; *Zinn, supra* at 343-344. Accordingly, the trial court did not abuse its discretion by assigning 50 points to PRV-3 because evidence in the record supported finding that defendant had three or more prior high severity juvenile adjudications. MCL 777.53(1)(a); *McLaughlin, supra.*

In a motion for remand to conduct a hearing in the trial court on this issue, defendant proffered printouts from the Wayne Circuit Court, which indicate the armed robbery petition, as well as an October 1986 assault and battery charge were "closed." Defendant argues that these two petitions were dismissed pursuant to a plea bargain in which defendant pled guilty to a felonious assault case that is listed in the PSIR as only an assault and battery adjudication. This proffer is also insufficient to establish a prima facie case of an inaccuracy. As the prosecutor correctly notes, because a case is "closed" does not necessarily mean the juvenile petition was denied, set aside or vacated. Indeed, the prosecutor also submits printouts from the Wayne Circuit Court, which not only appear to support the information in the PSIR, but also indicate defendant's juvenile history may be more extensive then reported in the PSIR.

Even if defendant has only two high severity juvenile adjudications, and the correct score for PRV-3 is 25 points, the error would be harmless. The reduction of 25 points in defendant's prior record score would result in a total prior record score of 70 points and a prior record level "E" rather than "F." MCL 777.61. But the sentencing information report (SIR) used by the trial court was not adjusted because defendant was subject to an enhanced sentence under MCL 769.10. The upper limit of the recommended minimum sentence range should have been increased by twenty-five percent. MCL 777.21(3)(a). Thus, according to defendant's scoring, the correct recommended minimum sentence range should have been 270 months to 562 months or life. The trial court's minimum prison term of 525 months for second-degree murder would therefore be within the recommended minimum guidelines range when scored according to defendant's claim of having only two high severity juvenile adjudications.

When the trial court imposes a minimum sentence within the recommended minimum guidelines range of accurately scored sentencing guidelines, this Court must affirm the trial court's sentence. MCL 769.34(10); *People v Garza*, 469 Mich 431, 435; ___ NW2d ___; *Babcock, supra* at 261. Moreover, on appeal if it appears that the guidelines were incorrectly scored but the correct score would not change the guidelines recommended minimum range, remand for resentencing is not required. *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003). Further, an erroneous scoring of the guidelines does not require resentencing if the trial court would have imposed the same sentence regardless of the error. *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003). Here, it is clear the trial court intended to impose a minimum sentence at the upper end of the appropriate guidelines range. Although the recommended guidelines range would change if the guidelines were scored as defendant claims, the application of MCL 777.21(3)(a) would actually increase the upper limit of the range. Under these circumstances, the error alleged by defendant regarding PRV-3 was harmless and resentencing is not required.

Defendant also argues that PRV-4 should have been scored as two points rather than 0 points, and that PRV-5 should have been scored as two points rather than ten points. Defendant did not preserve this argument for appeal by raising it at or before sentencing. MCR 6.429(C). This Court reviews unpreserved claims of sentencing error for plain error affecting substantial rights. *People v McCrady*, 244 Mich App 27, 32; 624 NW2d 761 (2000). For the reasons discussed above, plain error did not occur. Moreover, because the recommended minimum guidelines range would not change, defendant cannot establish the alleged error affected his substantial rights. *Davis, supra*; *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Next, defendant claims he was denied the effective assistance of counsel by counsel's failure to object to the sentence guidelines scoring of PRV-5, MCL 777.55, and by failing to object to the scoring of OV-3, which was scored at 35 points because a victim was killed, MCL 777.33(1)(b).[1] Defendant contends OV-3 should have been scored zero because the sentencing offense was a homicide, MCL 777.33(2)(b), and the death did not result from the "operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive," MCL 777.33(2)(c). We disagree.

Because defendant failed to preserve his claim of ineffective assistance of counsel by filing a motion for new trial or otherwise by creating a record in the trial court our review is limited to the existing record. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To establish ineffective assistance of counsel defendant must first show that counsel's performance was deficient as measured against objective reasonableness under the circumstances according to prevailing professional norms. *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994). Second, defendant must show the deficiency was so prejudicial that he was deprived of a fair trial. *Id*. at 309. To establish prejudice, there must be a reasonable probability that but for counsel's alleged errors the trial outcome would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Moreover, counsel's error must have been so serious that it resulted in a fundamentally unfair or unreliable trial. *Rodgers, supra* at 714.

Defendant's argument that he was denied the effective assistance of counsel fails because he cannot establish that he suffered any prejudice as a result of counsel's alleged errors. Even if defendant correctly interprets MCL 777.33, and OV-3 should have been scored zero, the total offense variable score would be reduced from 90 points to 55 points. This change would not alter the offense variable level (II), and therefore, would not alter the sentence guidelines recommended range. Accordingly, defendant cannot establish his claim of ineffective assistance because he cannot establish that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Toma, supra* at 302-303.

[1] 2003 PA 134 amended MCL 777.33(1)(a) effective August 1, 2003 to increase the number of points assigned from 35 to 50.

Next, defendant argues that the trial court erred by permitting Tameka Smith, the victim's girlfriend, to testify that on the evening of the shooting Joe Broyles told her that defendant had shot the victim in the back. Again, we disagree.

To preserve an evidentiary error, a party must object at trial on the same grounds raised on appeal. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Here, defendant objected to the testimony at trial but did not state a specific basis for the objection. Because the context of the colloquy between the trial court and the prosecutor concerned admissibility of the testimony as an excited utterance, defendant has only preserved an objection based on hearsay. Defendant forfeited his claim that his rights under the Confrontation Clause were violated. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

We review the admission or exclusion of evidence by the trial court for a clear abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would say that there is no justification or excuse for the trial court's decision. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). On a close evidentiary question, the decision of the trial court ordinarily cannot be an abuse of discretion. *Layher*, *supra* at 761. Preserved nonconstitutional evidentiary error will not warrant reversal unless it involves a substantial right, and in light of the weight and strength of the untainted evidence, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000); *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

An unpreserved claim of constitutional error is reviewed for plain error that affects substantial rights. MRE 104(d); *Carines*, *supra* at 774. Reversal is warranted only when a defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

MRE 802 provides that hearsay "is not admissible except as provided by these rules." But MRE 803(2) permits "hearsay testimony that would otherwise be excluded because it is perceived that a person who is still under the 'sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy.'" *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), quoting 5 Weinstein, Evidence (2d ed), § 803.04[1], p 803-19. There are two requirements for the admission of an excited utterance: (1) that a startling event occurs, and (2) that the resulting statement is made while under the excitement caused by the event. *Smith*, *supra*. Although the length of time between the startling event and the statements is an important factor to consider in determining admissibility it is not controlling. *Id*. at 551. Rather, the critical question is whether the declarant is still under the stress of the event, and the trial court is accorded wide discretion in making that preliminary factual determination. *Id*. at 551-552.

In the present case, defendant does not dispute that the shooting to which the statement related was a "startling event." The trial court admitted the hearsay at issue after a foundation was laid that the declarant was "real tore up," appeared "panicking," was "real upset," and "almost kind of crying." Other evidence indicated the shooting to which the statement related occurred about one hour before the statement. Moreover, the declarant had earlier testified in the

trial concerning his observations that formed the basis for his declaration to the witness. Defendant's argument that there was an insufficient foundation for admission of the hearsay because of limitations on the declarant's observations (darkness) and memory (history of drug use) go to the credibility of the declarant not the admissibility of the hearsay. See MRE 806. The trial court's decision on close evidentiary questions ordinarily cannot be an abuse of discretion. *Smith*, *supra* at 550. The trial court did not abuse its discretion admitting the statement as an excited utterance under MRE 803(2).

Defendant's unpreserved claim that his Confrontation Clause rights were violated is without merit. The excited utterance exception to the rule against admitting hearsay is "firmly rooted." See *White v Illinois*, 502 US 346, 355-356 n 8; 112 S Ct 736; 116 L Ed 2d 848 (1992). Accordingly, because the trial court did not abuse its discretion in admitting the hearsay at issue under MRE 803(2), the statement at issue carries sufficient indicia of reliability to satisfy the Confrontation Clause "without more." *People v Meredith*, 459 Mich 62, 69 n 13; 586 NW2d 538 (1998). Thus, plain error affecting defendant's substantial rights did not occur. *Carines*, *supra* at 763, 774; *Coy*, *supra* at 16.

Moreover, because the declarant testified at trial, and was subject to cross-examination, any error in admitting the hearsay was clearly not outcome determinative in light of the weight and strength of the other properly admitted evidence. *Rodriguez*, *supra* at 473-474.

Last, defendant argues that the trial court abused its discretion by not permitting cross-examination of the victim's girlfriend regarding whether the victim's friends owned guns, contending this questioning was proper to support his claim of self-defense by showing the victim had access to weapons other then his own. We disagree again.

A criminal defendant does not have an unlimited right to confront witnesses against him, *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998), and the trial court's limitation of cross-examination is reviewed for an abuse of discretion, *People v Bell*, 88 Mich App 345, 348; 276 NW2d 605 (1979). As the prosecutor correctly notes, the trial court has a duty to limit the introduction of evidence to relevant and material matters, and to assure that all parties that come before it receive a fair trial. MCL 768.29; *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996). Moreover, a defendant's right to confront and cross-examine witnesses against him does not include the unlimited right to admit all relevant evidence, or cross-examine on any subject. *Ho*, *supra* at 189; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Id.*, quoting *Delaware v Van Arsdall*, 475 US 673, 679; 106 S Ct 1431, 1435; 89 L Ed 2d 674 (1986). Rather, the Confrontation Clause guarantees an accused a reasonable opportunity to test the truthfulness of witnesses that testify against him. *Ho*, *supra* at 190.

In the case at bar, defendant's questioning of the victim's girlfriend regarding whether the victim's friends carried guns was not intended to test the witness's truthfulness but rather an effort to support defendant's theory that he shot the victim in self-defense. The trial court did not abuse its discretion by ruling the evidence was not relevant. To show that the victim's friends

might carry guns is no more relevant then evidence that guns could be purchased at a store or obtained on a street corner. Under the circumstances of this case, evidence that defendant's friends carried guns would be logically relevant to defendant's theory of self-defense only if it was shown a friend of the victim carried a gun, and had an opportunity provide a gun to the victim before the shooting. Even assuming that the witness could have testified that the victim's friends carried guns, the evidence would have been, at best, marginally relevant. The trial court did not abuse its discretion by limiting defendant's cross-examination.

Defendant was not denied a fair trial by the trial court's ruling. He testified that the victim was in fact armed and shot at him. Defendant also presented evidence explaining that the police did not find the victim's gun because they searched the wrong field. Finally, defendant was permitted to present evidence that the victim was a drug dealer who habitually carried a gun, and who was upset with defendant for loosing some of the victim's drugs. Defendant was therefore not prevented from submitting evidence to support his theory of self-defense.

We affirm defendant's convictions and sentences.

/s/ Henry William Saad
/s/ Jane E. Markey
/s/ Patrick M. Meter